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# *Nollan* and *Dolan*: Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees

## ABSTRACT

Local governments employ various systems to determine how to justify and when to assess transportation impact fees on new or proposed development. Most litigation in this field has resulted from the developers' disagreement over local governments' discretion in deciding how to justify and when to assess the fees. Thus, the main disputes that have arisen with respect to transportation impact fees are over these simple *how* and *when* questions. Although most systems implemented by local governments appear to be fair and equitable, this Article sets out to find an optimal transportation impact fee system that most accurately conforms to the standards established by the United States Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, decisions which serve as guideposts for justifying the implementation of an impact fee system.

## I. INTRODUCTION

As populations and cities within the United States continue to grow, roadway conditions will deteriorate correspondingly. Local governments have sought to alleviate the heavy toll on roadways by requiring developers to pay for improvements via the issuance of transportation impact fees.<sup>1</sup> Similar to general impact fees, where local governments require developers to pay for their impact on infrastructure, transportation impact fees are one method by which local governments can acquire the necessary funds to make their local roadways more comfortable and adequate to serve their citizens.

In general, it is more difficult to establish a uniform system for collecting transportation impact fees than for other infrastructure improvements because each development has location-specific qualities and improvement needs.<sup>2</sup> As a result, the determination of how to

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1. See THOMAS P. SNYDER & MICHAEL A. STEGMAN, PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE 81-84 (1986).

2. VERGIL G. STOVER & FRANK J. KOEPKE, INSTITUTE OF TRANSPORTATION ENGINEERS: TRANSPORTATION AND LAND DEVELOPMENT 21 (1988).

justify and when to charge impact fees for transportation improvements varies between communities. The majority of legal problems concerning transportation impact fees result from the absence of a uniform system.<sup>3</sup> Thus, in order to solve these legal issues, the states should seek to establish legislation that creates an optimal uniform transportation impact fee system for both city and county governments.

The implementation of a uniform system for collecting transportation impact fees cannot be accomplished without some guidance. This guidance can be found in the exaction standards established by the United States Supreme Court in *Nollan v. California Coastal Commission*<sup>4</sup> and *Dolan v. City of Tigard*.<sup>5</sup> Transportation impact fees are best analyzed under the *Nollan* and *Dolan* standards because of the wide range of assumptions and methods employed in their determination. These standards provide broad guidelines that can be consistently and fairly applied, but also allow reasonable latitude to the specific situation. As long as the system adopted by the state appears to conform to the essential nexus and rough proportionality standards as set forth in *Nollan* and *Dolan*, it should be consistent, equitable and valid. Each state not only needs to adopt a valid system, but must also adopt the most practical system to determine how to justify and when to assess transportation impact fees.

This Article provides direction to state governments in establishing a uniform system when determining how to justify and when to assess transportation impact fees. It explores the significance of *Nollan* and *Dolan* and recommends a uniform system that most accurately complies with their established standards. The Article also reviews various methods used by local governments to assess fees and recommends a “hybrid method” that would be suitable to all communities within the state. This Article proceeds in Part II by providing a brief overview of the history and purpose of impact fees and by following their development through the United States Supreme Court cases of *Nollan* and *Dolan*. Part III, section A specifically addresses transportation impact fees and their purpose and establishes a few preliminary steps governments must take to ensure the validity

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3. Soumya S. Dey & Jon D. Fricker, *Traffic Impact Analysis and Impact Fees in State Departments of Transportation*, 64 INST. TRANSP. ENG'RS J. 39 (May 1994) (indicating that schemes for fee assessment vary from state to state and correspond to at least three distinct categories, based on the results of a survey conducted to determine the status of traffic impact analysis and traffic impact fees in various states).

4. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

5. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

of a transportation impact fee. Section B presents three methods employed by local governments to determine when to assess a transportation impact fee. Part IV includes an analysis of the different methods and highlights the advantages and disadvantages of each method in light of the policies established by *Nollan* and *Dolan*. It also includes a recommendation of a method to be adopted by the states and implemented at both city and county levels. Finally, Part V includes a brief summary of the analysis and the conclusion of this Article.

## II. GENERAL BACKGROUND OF IMPACT FEES

Impact fees are implemented by local governments on new or proposed developments to assist in paying for a portion of the “off-site capital improvements that are necessitated by and benefit the [] development.”<sup>6</sup> Impact fees have become more prominent in local and state governments as people continue to move into cities, increasing the urban population and enhancing the need for schools, waste management, transportation, and other infrastructure costs.<sup>7</sup>

The courts have adopted standards to guide local governments when developing exaction ordinances, which may also apply to transportation impact fees. These exaction standards were established and first applied by the United States Supreme Court in *Nollan* and *Dolan* in order to conform to the Fifth Amendment. Although the Court has not yet ruled on whether these standards should apply to impact fees, leaving that issue for each state to decide, this Article supports the position of the California Supreme Court in *Ehrlich v. City of Culver City*, wherein the court held that the *Nollan* and *Dolan* standards applied to impact fees.<sup>8</sup> Since California’s ruling, several other states have followed suit.<sup>9</sup> Accordingly, local and state governments should look to *Nollan* and *Dolan* as guideposts when

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6. *What is an impact fee?*, IMPACTFEES.COM, <http://www.impactfees.com/faq/general.php> (last visited Oct. 27, 2010) (this website includes general information and facts on impact fees).

7. ARTHUR C. NELSON ET AL., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY 9 (2008).

8. 911 P.2d 429 (Cal. 1996).

9. *Ocean Harbor House Homeowners Ass’n. v. Cal. Coastal Comm’n*, 163 Cal. App. 4th 215 (6th Dist. 2008) (claiming *Ehrlich* was “particularly instructive”); *Breneric Assocs. v. City of Del Mar*, 69 Cal. App. 4th 166 (4th Dist. 1998); *Town of Flower Mound v. Stafford Estates, Ltd. P’ship*, 135 S.W. 3d 620 (Tex. 2004); *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (finding *Ehrlich* “more persuasive”); *see Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966, 983 (Or. Ct. App. 2002) (confirming *Nollan/Dolan’s* applicability to “monetary exactions imposed through ad hoc adjudicatory challenges”).

establishing a uniform system to implement the use of transportation impact fees.

A. *Nollan v. California Coastal Commission*

In *Nollan*, the United States Supreme Court concentrated on the connection between the exaction required by the government and the burden imposed by the new development.<sup>10</sup> The Nollans owned beachfront property neighboring two different public beaches.<sup>11</sup> They desired to tear down a bungalow that resided on the property and to replace it with a new home that resembled the rest of the neighborhood.<sup>12</sup> The California Coastal Commission would not grant the required permit unless the Nollans agreed to provide a public easement across a portion of their property parallel to the beach in order to facilitate public access.<sup>13</sup> The Commission argued that the new beachfront home would “increase blockage of the view of the ocean . . . that would prevent the public ‘psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.’”<sup>14</sup> As a result, the Commission concluded that it could properly require the Nollans to “offset that burden by providing additional . . . access to the public beaches” via a public easement.<sup>15</sup>

The *Nollan* Court invalidated the public easement requirement because of “the lack of nexus between the condition and the original purpose of the building restriction.”<sup>16</sup> Without this nexus, the city’s action constituted a taking without just compensation in violation of the Fifth Amendment. The Court reasoned that in order for the government to avoid a constitutional violation, the exaction must be reasonably related to the added burden or enhanced public needs that the new development either creates or to which it contributes.<sup>17</sup> The Court concluded that the building restriction was not a valid regulation because there was no relationship between a public easement and the “psychological barrier” that prevented the public from viewing the beach.<sup>18</sup> Therefore, “the Court required that exactions be scrutinized to ensure they specifically address problems that are attributable to the

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10. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

11. *Id.* at 827.

12. *Id.* at 828.

13. *Id.*

14. *Id.* at 828–29 (citation omitted).

15. *Id.* at 829.

16. *Id.* at 837.

17. *Id.* at 838.

18. *Id.* at 838–39.

new development.”<sup>19</sup>

Although the Court established that government exactions must be related to and ease the negative impacts of new development, the Court did not address the issue of how close the fit between the two must be, leaving that question unanswered.<sup>20</sup>

### B. Dolan v. City of Tigard

*Dolan* provided the framework for the Court to answer the question of how strong the correlation between a regulatory objective and an exaction should be. Dolan planned to double the size of her plumbing and electric supply store and to pave a parking lot.<sup>21</sup> The City Planning Commission would grant the permit on the condition that Dolan dedicate a portion of her property to provide for both flood protection and a pedestrian/bicycle pathway as part of the city’s greenway system.<sup>22</sup> The Commission argued that the land dedications were reasonably related to the projected impacts of Dolan’s project.<sup>23</sup> Specifically, the Commission noted that the dedication of the land would protect the floodplain from the increased storm water run-off that the “impervious surface” of the parking lot would create, and that the bicycle path would offset the increase in traffic congestion to which a larger store would contribute.<sup>24</sup>

The United States Supreme Court agreed with the Commission that an essential nexus existed between the legitimate public purpose and the permit condition.<sup>25</sup> However, the *Dolan* Court did not end its analysis at the finding of a nexus, as in *Nollan*, but took an additional step to determine “the required degree of connection between the exactions and the projected impact of the proposed development.”<sup>26</sup> In

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19. *Id.* at 837; Joseph D. Lee, *Sudden Impact: The Effect of Dolan v. City of Tigard on Impact Fees in Washington*, 71 WASH. L. REV. 205, 215 (1996).

20. *Nollan*, 483 U.S. at 838 (declining to adopt a set test for “fit” because the Court could “accept, for the purposes of discussion, the Commission’s proposed test as to how close a ‘fit’ between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.”); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 238–39 (2006) (“Left open for another day was the question of how strong the ‘essential nexus’ between the regulatory objective and the exaction would have to be.”).

21. *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

22. *Id.* at 380.

23. *Id.* at 381.

24. *Id.* at 381–82.

25. *Id.* at 387–88. In its analysis the Court found that it was “obvious” that a nexus exists between preventing flooding and expanding the parking lot. *Id.* at 388. The Court also found that “the same may be said” for the attempt to reduce traffic congestion through an alternate means of transportation, specifically a pedestrian/bicycle pathway. *Id.*

26. *Id.* at 386.

describing the necessary relationship, the Court established a new standard of “rough proportionality,” refusing to adopt existing tests from other jurisdictions because they were either too relaxed or too exacting.<sup>27</sup> The Court defined “rough proportionality” as a quantitative test in which “[no] precise mathematical calculation is required, but the City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>28</sup> In light of its newly adopted test, the Court concluded that the City’s demands for a public greenway violated Dolan’s rights as a property owner.<sup>29</sup> The Court explained that the City went too far in demanding Dolan to dedicate a portion of her land for the greenway system, especially when the City failed to show how a public easement, as opposed to a private one, would provide any more flood control.<sup>30</sup> Furthermore, the City made no effort to quantify its findings in order to sustain the easement for a pedestrian/bicycle pathway.<sup>31</sup> Therefore, the *Dolan* Court rejected the land use exactions because the City did not sufficiently establish a correlation between the burdens resulting from Dolan’s proposed development and the relief that would be granted by the exactions.<sup>32</sup>

In light of these decisions, jurisdictions should apply a two-part analysis for determining the validity of impact fees. The impact fee should: (1) reasonably relate to added burdens that the new development either creates or to which it contributes and (2) seek to lighten a city’s burden of providing improvements by requiring developers to contribute their proportionate share of improvement costs.

### III. TRANSPORTATION IMPACT FEES

Similar to general impact fees, transportation impact fees help offset the demands of future traffic created by growth and new development.<sup>33</sup> Looking to *Nollan* and *Dolan*, transportation impact

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27. *Id.* at 389–91. The Court rejected the practice of some states that seemed to require mere generalized statements to show the “connection” between the exaction and the proposed development because they were “too lax.” *Id.* at 389. Further, the Court declared the “specifically and uniquely attributable test” too “exacting.” *Id.* at 389–90. The Court believed the intermediate position of the “reasonable relationship” test adopted by a number of states more closely resembled an acceptable federal standard. *Id.* at 390–91. However, to avoid confusion, they used the term “rough proportionality” to describe their test. *Id.* at 391.

28. *Id.* at 391.

29. *Id.* at 392–94.

30. *Id.* at 393–95.

31. *Id.* at 395–96.

32. *Id.* at 393–96.

33. *See* Lee, *supra* note 19, at 224–25 (footnote omitted) (“Washington’s Local

fees should relate to new development and seek to lighten a city's burden of providing transportation improvements by requiring developers to contribute their proportionate share of improvement costs. Although the Supreme Court has provided some indirect guidance to local governments through *Nollan* and *Dolan*, the absence of any standard methodology or policy for assessing transportation impact fees has led local governments to exercise their discretion on how and when to issue them. Most often, developers disagree with the apportioned fee and argue that local governments have abused their discretion by imposing an unjust or irrational fee, which has ultimately resulted in tedious litigation.<sup>34</sup> These problems will likely be eliminated if states adopt a uniform system—applicable at both city and county levels—that adequately answers how to justify and when to assess transportation impact fees.

In establishing a uniform system for assessing fees, states should follow the example set by many local governments. Generally, local governments charge transportation impact fees after performing a preliminary analysis that provides a basis for the fee.<sup>35</sup> After identifying an essential nexus between the fee and the improvements necessitated by development, cities impose fees based on a method that determines how much is required to cover the development's impact on the transportation system.<sup>36</sup> In following the example of local governments, states should focus on adopting a standard method likely to be suitable for all communities within the state. One result of adopting this type of a uniform system would be a reduction in unnecessary litigation that often results when local governments exercise their discretion. This section outlines the actions that state governments should take to answer the questions of how and when to assess a transportation impact fee. The following subsections introduce preliminary measures that local governments have and should implement, and the different methods for imposing fees that state governments should consider when fashioning a uniform method for assessing transportation impact fees.

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Transportation Act authorizes transportation impact fees to offset the demand of growth and new development by mitigating off-site transportation impacts.”).

34. *See* *F & W Assocs. v. County of Somerset*, 648 A.2d 482, 485 (N.J. Super. Ct. App. Div. 1994) (plaintiffs arguing that chaos results from municipalities each developing their own fee schemes as opposed to an overarching state scheme).

35. SNYDER & STEGMAN, *supra* note 1, at 81–84 (detailing common methods of preliminary analysis for development fee schemes).

36. *Id.* (noting that “the principle of rational nexus means that a city can charge a developer only a pro rata share of the cost of roads that serve his project”).



*A. How?: Taking Preliminary Measures*

Prior to making the determination of when to assess a transportation impact fee, local governments should consider how to justify such a fee. States should permit local governments to impose transportation impact fees as long as they comply with the *Nollan* and *Dolan* standards, meaning the fees must be “‘reasonably related to the added traffic growth attributable to the development,’ and the maximum fee ‘shall not exceed the property owner’s ‘fair share’ of such improvement costs.’”<sup>37</sup> These standards do not require exactitude because they do not establish a precise mathematical calculation, but only require that local governments make some sort of individualized determination showing to what extent transportation improvements are necessitated by each development.<sup>38</sup>

In *F & W Associates v. County of Somerset*, the Township introduced a number of preliminary steps that would likely expose the correlation between the fee and the required improvements.<sup>39</sup> Here, the Township adopted a local ordinance to impose transportation impact fees in order to offset improvement costs attributable to a proposed major subdivision.<sup>40</sup> In adopting the ordinance, the Township engaged in a demanding process, which included conducting a specialized transportation study and incorporating those results in a transportation plan.<sup>41</sup> The ordinance also specifically set forth a formula, devised from the study results, for calculating each development’s fair share cost of the improvements.<sup>42</sup> The court found that this “rigorous process” satisfied the applicable standards and provided a method to determine the traffic impact attributable to each individual development.<sup>43</sup>

In light of *F & W Associates*, the performance of a few

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37. *F & W Assocs.*, 648 A.2d at 485 (quoting N.J. STAT. ANN. § 27:1C-7h (1989)).

38. *Dolan v. City of Tigard*, 512 U.S. 374, 391(1994); *F & W Assocs.*, 648 A.2d at 486-87.

39. 648 A.2d 482.

40. *Id.* at 488.

41. *Id.* at 488. The court details the town’s procedure as follows:

The ordinance was adopted only after a comprehensive study . . . of such factors as existing road facilities, current zoning, projected population growth, and existing commercial uses in the area . . . . Based on projected full development of potential residential, retail and office use, the study adopted a vehicle “trip generation” methodology and from this model, predicted incremental traffic impact resulting from future development of land. The study estimated how much extra traffic would be generated by each development in the target area . . . . The estimates were grounded on industrial standards, observations and empirical data obtained from traffic counts. The study then suggested what roadway improvements would be needed to accommodate the increased demands, and estimated the cost of those improvements. *Id.*

42. *Id.* at 484 (“[T]he formula was based on the number of ‘trips’ generated.”).

43. *Id.* at 488.

preliminary steps presents an approach that, when recommended, will likely validate the imposition of transportation impact fees. These preliminary steps include (1) creating a transportation master plan and establishing a standard level of serviceability for roadways and intersections; and (2) conducting a traffic impact study analyzing the effect of the proposed development on the surrounding transportation system.

*1. Transportation master plan & level of service standards*

The direct result of new or proposed development on the transportation system is determined by analyzing “the impact that will be created by the vehicles and pedestrians traveling to and from the development.”<sup>44</sup> The analysis of a development’s impact on surrounding roadways is generally determined by a comprehensive traffic impact study, which will be explored later on. After performing a traffic study, the impact can then be measured by the effect that the development has the established level of service of the roadways and intersections,<sup>45</sup> and the current and estimated future traffic volumes found in the transportation master plan. Therefore, before local government can determine the degree of impact on the transportation system, it should adopt a transportation master plan and establish level of service standards for the roads and intersections within its city or county boundaries.

A transportation master plan is a summary prepared by local governments to detail all aspects of transportation planning, both current and future.<sup>46</sup> In very general terms, the purpose of a transportation master plan is to “identify major travel corridors and provide projections of the approximate volume of traffic within these corridors . . . identify major potential problem areas in the proposed network . . . [and] provide a basis for planning and programming major network improvements.”<sup>47</sup> More specifically, the plan includes current and future traffic estimates for every roadway within the municipality based upon population predictions provided by a state agency, and identifies transportation improvements that correlate with

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44. Lee, *supra* note 19, at 225.

45. *Id.*

46. See generally *STOVER & KOEPKE*, *supra* note 2, at 11–15; *Dep’t of Transp. v. City of Klamath Falls*, 34 P.3d 667, 669 n.1 (Or. Ct. App. 2001) (defining transportation system plan to mean “a plan for one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.”) (quoting OR. ADMIN. R. 660-012-0005(32) (1998), *amended by* OR. ADMIN. R. 660-012-0005(38) (2010)).

47. *STOVER & KOEPKE*, *supra* note 2, at 11.

the predicted growth.<sup>48</sup> Thus, a transportation master plan includes reliable estimates for future traffic growth and development that provide guidance in both transportation and land-use planning.<sup>49</sup>

The level of service (“LOS”) is a classification given to a roadway or intersection to determine its level of serviceability.<sup>50</sup> Most local governments implement LOS standards determined by the Institute of Traffic Engineers (“ITE”) or the Transportation Research Board (“TRB”).<sup>51</sup> Under these schemes, roads and intersections are classified according to their traffic flow and waiting time characteristics ranging from levels “A” through “F.”<sup>52</sup> Most cities aim to maintain their roadways and intersections at a base level of “C” or “D” when classifying them, which “allow[s] for some congestion, but not enough to affect travel speeds or waiting times significantly.”<sup>53</sup> A proposed development has an impact on the transportation infrastructure, once it causes the traffic flow characteristics to change to a LOS lower than the predetermined city standard.<sup>54</sup> However, some cities agree that the fact that the LOS deteriorates at all is sufficient evidence to establish a nexus and impose a fee.<sup>55</sup>

A correlation between the fee and the required improvement will likely be established as long as the proposed development affects the local roadways or intersections as determined by the existing and future protections, and established LOS standards. Accordingly, local governments should only assess transportation impact fees if the

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48. Email from Ryan Hales, P.E., PTOE, AICP, Founder of Hales Engineering, to Author (Jan. 30, 2010, 10:04:00 MST) (on file with author).

49. STOVER & KOEPKE, *supra* note 2, at 12 (“Both the general urban (comprehensive) planning process and the urban transportation planning process commonly utilize a single 20-year time horizon in which permanent elements, 20-year requirements, and short-term needs are conglomerated in a single large study.”).

50. Level of service standards are the acceptable performance levels for specific services in a community, which in this case includes roadways and intersections. *See generally* SNYDER & STEGMAN, *supra* note 1, at 82.

51. *See generally id.*; *About ITE*, INSTITUTE OF TRANSPORTATION ENGINEERS, <http://www.ite.org/aboutite/index.asp> (last visited Oct. 8, 2010) (explaining that the Institute of Transportation Engineers is a national organization of “transportation professionals, including . . . transportation engineers, transportation planners, consultants, educators and researchers”); TRANSP. RESEARCH BD. OF THE NAT’L ACADS., <http://www.trb.org/Main/Home.aspx> (explaining that the Transportation Research Board is also a community that “engages professionals worldwide . . . to lay the foundation for innovative transportation solutions”) (last visited Oct. 8, 2010).

52. SNYDER & STEGMAN, *supra* note 1, at 82.

53. *Id.*; Dey & Fricker, *supra* note 3, at 43 (consisting of a survey of the majority of the states showing that of the responding states, a majority defined an acceptable level of service level of C or D).

54. Dey & Fricker, *supra* note 3, at 43 (noting that a number of responding states only impose impact fees when the LOS deteriorates below the established base level).

55. *Id.* (noting that some responding states impose impact fees when the LOS deteriorates at all).

proposed development has an impact on traffic volumes, causing the LOS to deteriorate.

## 2. *Traffic impact study*

A traffic impact study (“TIS”) is essential for determining the proportionate share cost of transportation improvements for developers. The primary purpose of these studies is to identify the necessary improvements to ensure that the transportation system will adequately support the additional trips created by the proposed development.<sup>56</sup> The substantial amount of data, modeling and analysis contained in the TIS is often used to determine the extent of a development’s impact on the LOS of a roadway or intersection.<sup>57</sup> Any TIS may include one of several techniques and methodologies that the transportation consultants, in their professional judgment, considered appropriate when analyzing the extent of a development’s impact.<sup>58</sup> One of the main indicators used to uncover the degree of a development’s impact is trip generation, which estimates the number of trips generated to and from the development.<sup>59</sup> Each TIS should include the analysis of the two essential components of trip generation, which include: site-oriented traffic and non-site traffic.<sup>60</sup> The traffic generation of the project is then used to assess each new or proposed development their proportionate share of the roadway and intersection improvements.<sup>61</sup>

Site-oriented traffic includes trips that the new or proposed development is expected to generate.<sup>62</sup> Site-oriented traffic is generally broken down and analyzed according to the trips generated by the

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56. Timothy T. Jackson, *Traffic Impact Study and Proportionate Share Impact Fees*, 64 INST. TRANSP. ENG’RS J. 47, 47 (Sept. 1994).

57. *Id.*

58. Although the specific content of each TIS will differ depending on the type and size of development, a minimum standard guideline would likely include the following information: existing conditions, trip generation and design hour volumes, trip distribution and traffic assignment, existing and projected traffic volumes, capacity analysis, traffic accidents, traffic improvements, conclusions, and a summary of findings and recommendations. STOVER & KOEPKE, *supra* note 2, at 20–21.

59. *Id.* at 28. The term “trips” is synonymous with vehicular traffic. *See id.* The term “trips” does not include bicycle or pedestrian traffic. There are two types of trips or traffic: (1) site-oriented and (2) non-site. *Id.* For the purposes of this Article, the term “trips” generally refers to site-oriented traffic, which determines the number of additional vehicles traveling to and from the new development on each surrounding roadway segment.

60. *Id.* at 28.

61. Email from Grant G. Schultz, Ph.D., P.E., PTOE, Assistant Professor of Engineering, Brigham Young University, to Author (Mar. 6, 2010, 16:03:00 MST) (on file with author).

62. STOVER & KOEPKE, *supra* note 2, at 28.

development's specific land-use type and the estimated directional distribution.<sup>63</sup> The trip generation of each development varies according to the "type of land-use and the intensity of the activity" as determined by the ITE.<sup>64</sup> Additionally, trip generation is generally measured by the number of trips to and from the site during the peak hour of a twenty-four hour period, while also factoring in daily and monthly variations that occur as a result of different land-use activities.<sup>65</sup> The proposed development will normally be assessed a traffic impact fee that reflects the number of site oriented trips that it contributes to the surrounding roadways and the effect those trips have on the LOS of surrounding roadways and intersections.

On the other hand, non-site oriented traffic includes trips that would occur even in the absence of the proposed development.<sup>66</sup> Naturally, the impact of these trips is excluded from the calculation of the impact fee because they are not causally related to the new development. There are several methods to determine the future traffic volumes of the streets surrounding the proposed development, all of which are viable but subject to some error.<sup>67</sup>

States can ensure the validity of transportation impact fees by requiring the performance of necessary preliminary steps. These steps include: (1) creating a transportation master plan; (2) setting standards for roadway and intersection serviceability; and (3) requiring that a specialized analysis of a development's impact on the transportation system be conducted for each new or proposed development. By requiring these preliminary measures, state governments can establish a nexus between proposed developments and transportation impacts, and accumulate evidence to support local governments' determination of a development's proportionate share of improvement costs.

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63. *Id.* The land use designation is determined by the type of the development, whether it is residential, commercial, industrial, etc. Directional distribution involves "estimating the direction in which traffic will approach and depart the site." *Id.* at 49. The directional distribution normally depends on various site-specific conditions, which include: "size of the proposed development . . . type of the development . . . prevailing conditions on the existing street system . . . [and] available data base." *Id.*

64. *Id.* at 28–29. The ITE Trip Generation is the principal source of trip-generation rates. *Id.* The rates used are determined by a base unit that "must . . . be functionally related to the volume of traffic generated . . . be relatively easy to establish/measure . . . [and] provide consistent and transferrable rates." *Id.* at 29. For example, trips produced by a residential land use are normally calculated per occupied dwelling unit, while trips produced by commercial land use are generally calculated per 1,000 square feet of floor area. *Id.* at 30.

65. *Id.* at 28–29.

66. *Id.* at 64.

67. *Id.* The four methods for determining the volume of existing traffic on the streets surrounding the proposed development include: "analogy of traffic increase . . . trend analysis . . . growth factor . . . traffic assignment." *Id.* Due to the complexity of each method, they were not described in detail.

*B. When?: Methods Used to Assess Transportation Impact Fees*

Although on its face a fee may appear to be valid when preliminary measures are performed, local governments may still be subject to litigation if their discretionary method for determining when to assess the fee fails to comply with the *Nollan* and *Dolan* standards.<sup>68</sup> These standards, applied in the transportation context, require that: (1) transportation impact fees must be “‘reasonably related to the added traffic growth attributable to the development,’” and (2) transportation impact fees must resemble the proportionate share cost of transportation improvements reasonably attributable to the proposed development.<sup>69</sup>

To comply with the *Nollan* and *Dolan* standards, the state should adopt a uniform system that provides a fair and equitable method for issuing and collecting transportation impact fees. This subsection provides an overview of three methods used by local governments to determine when to assess transportation impact fees. The three different methods analyzed in this subsection include: (1) trips generated; (2) average trip; and (3) average trip plus rebuttal.<sup>70</sup>

*1. Trips generated*

The “trips generated” method bases transportation impact fees on the number of trips generated from the new or proposed development. This method has been adopted by county ordinance and applied to developments in Broward County, Florida.<sup>71</sup>

States using this method require local governments to perform a Traffic Impact Study (“TIS”) for every new or proposed development as a preliminary measure of implementing a system to charge transportation impact fees. The TIS forms the foundation for determining when to assess transportation impact fees. As part of the TIS, local governments calculate the number of trips that will be generated by each development and must allocate those trips to surrounding roadways.<sup>72</sup> Local governments generally use specialized

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68. See *Home Builders & Contractors Ass’n of Palm Beach County v. Bd. of County Comm’rs*, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983); *Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966 (Or. Ct. App. 2002); *City of Olympia v. Drebeck*, 126 P.3d 802 (Wash. 2006).

69. *F & W Assocs. v. County of Somerset*, 648 A.2d 482, 485 (N.J. Super. Ct. App. Div. 1994) (quoting N.J. STAT. ANN. § 27:1C-7h (1989)); see NELSON ET AL., *supra* note 7, at 26 (2008); Lee, *supra* note 19, at 225.

70. These are not the actual names given to the different methods. For reference and identification purposes, I have named the methods.

71. SNYDER & STEGMAN, *supra* note 1, at 82–83.

72. STOVER & KOEPKE, *supra* note 2, at 20.

software that facilitates the complexities of allocating “trips originating or ending in the development to the appropriate place in the existing road network.”<sup>73</sup> Once the trips have been allocated, local governments use the software to calculate the “service levels for each link in the network and costs for bringing the system up to the desired level of service.”<sup>74</sup> In Broward County, the new development is only charged a fee if the development reduces the LOS below an established city standard and is only accountable for the improvements to bring the roadway back to function at standard capacity.<sup>75</sup> This method does not allow a rebuttal from the developers, nor does it permit any predetermined fee schedule. Thus, the trips generated method determines fees for each new or proposed development separately and on an individual basis, but does not account for the impact of every development.

## 2. *Average trip*

Instead of taking the approach of applying a transportation impact fee only when the level of service has been reduced below a city standard, others have implemented a system that seeks to hold developers accountable for their entire impact on roadways and intersections, regardless of whether the level of service has been reduced to a lower level. When applying the “average trip” method, local governments generally impose a fee based on the average impact of each land-use activity on the roadway system.<sup>76</sup> The average trip method, the contours of which often vary slightly between different jurisdictions, has been adopted by various local governments, including Washington County, Oregon; Washington State; and Palm Beach County, Florida.<sup>77</sup>

The average trip method is primarily based on the land-use activity of the development.<sup>78</sup> After specifying the land-use type of the development, the average trip is generally calculated according to the a handbook provided by the Institute of Transportation Engineers, which specifies a unit of measurement and an average gleaned from various studies that have been performed across the country.<sup>79</sup> Local

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73. SNYDER & STEGMAN, *supra* note 1, at 83.

74. *Id.*

75. *Id.*

76. *Id.*

77. See Home Builders & Contractors Ass’n of Palm Beach County v. Bd. of County Comm’rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983); Rogers Mach., Inc. v. Wash. County, 45 P.3d 966 (Or. Ct. App. 2002); City of Olympia v. Drebeck, 126 P.3d 802 (Wash. 2006).

78. SNYDER & STEGMAN, *supra* note 1, at 83.

79. *Id.*; see STOVER & KOEPKE, *supra* note 2, at 30–31 for an example of ITE trip rates.

governments then use the average trip figure to determine the cost of roadway improvements that the specific development would likely create.<sup>80</sup> Often times, the fee proceeds are then put into a trust fund, corresponding to pre-established zones determined by the county.<sup>81</sup>

Palm Beach County, Florida adopted the average trip method in *Home Builders and Contractors Association of Palm Beach County v. Board of County Commissioners of Palm Beach County*.<sup>82</sup> Palm Beach County implemented an ordinance that included an average trip formula to calculate the impact fee based on different land-use activities, divided the county into different zones, and established a trust fund for each zone.<sup>83</sup> According to the ordinance, “[f]unds collected from building activity in a particular zone may only be spent in that zone, and must be spent within a reasonable time after collection (not later than six years) or returned to the present owner of the property.”<sup>84</sup> In contrast to the other methods, the funds collected under this method do not necessarily have to be used for improvements caused by the specific development, but can be used for any transportation improvement project within the specified zone.<sup>85</sup>

Another example of the average trip method is found in *Rogers Machinery, Inc. v. Washington County*.<sup>86</sup> Washington County adopted an ordinance that expressly set a standard fee to charge for each different type of land-use activity.<sup>87</sup> The county applied a unit of measurement for each land-use type that established a “basis for trip determination.”<sup>88</sup> For example, the transportation impact of residential developments was determined by the number of dwellings situated therein, while for commercial developments the calculation centered on the “gross leasable square footage.”<sup>89</sup> Essentially, the county applied a non-discretionary uniform average fee based on a particular unit that related the land-use activity to the volume of traffic generated, was easy to measure, and provided consistent and

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80. SNYDER & STEGMAN, *supra* note 1, at 83. For example, Palm Beach determines its fee per housing unit for residential developments, while using the average trip at a housing unit. *Id.*

81. *Home Builders*, 446 So. 2d at 142 .

82. *Id.*

83. *Id.* at 142.

84. *Id.*

85. *Id.*

86. 45 P.3d 966 (Or. Ct. App. 2002). While this case is used for the illustration of a method of imposing fees, it should also be noted that the court here held that the reasoning of Nolan did not, in fact, apply to the imposition of transportation fees on new developments when “calculated pursuant to a legislatively set formula.” *Id.* at 980–83.

87. *Id.* at 981.

88. *Id.*

89. *Id.*



transferrable rates.<sup>90</sup> In contrast with the trips generated method, the average trip method does not take into account any location-specific factors, but applies a uniform fee for each different land-use type. In addition, this method only allows an element of discretion under limited circumstances, like when the land-use type is so unique it is not specified in the ordinance.<sup>91</sup> Thus, the average trip method consists of a uniform fee to be applied to all developments of a certain land-use type and does not take into account any site-specific conditions that may minimize the transportation impact.

### 3. *Average trip plus rebuttal*

The “average trip plus rebuttal” method includes the methodology of the average trip method described above, but with one important addition: the opportunity for rebuttal by the developer through the submission of his own independent TIS. This method was adopted by Olympia, Washington and is discussed in *City of Olympia v. Drebeck*.<sup>92</sup>

In this case, the state passed legislation that allowed each city to establish a general fee schedule for each type of land-use activity.<sup>93</sup> In compliance with state legislation, the City adopted a fee schedule, but also, in case of any disagreement, allowed the developer to seek a fee adjustment by submitting his own independent fee calculation.<sup>94</sup> If the fee calculation includes requisite criteria as described by local code and shows that certain site-specific conditions decreased a developer’s impact on the transportation system, a departure from the fee schedule could be granted.<sup>95</sup> Although the City had the authority to accept or reject the alternative calculations, when the parties could not come to an agreement, the issue was ultimately decided in the courts.<sup>96</sup> Thus, in certain circumstances, as in this case, the fee schedule does not

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90. See STOVER & KOEPKE, *supra* note 2, at 29.

91. *Rogers Mach.*, 45 P.3d at 982 n.17.

92. 126 P.3d 802 (Wash. 2006).

93. *Id.* at 804–05.

94. *Id.* at 803.

95. *Id.* at 809 (“Independent fee calculations have been granted by the City in the past where it was shown that the development in question did not generate projected peak hour traffic flows or that the traffic, if generated, primarily utilized transportation facilities in other cities. Cited examples were an apartment complex for the aged, a boat repair workshop, and a hotel on the edge of the City.”). *Id.* at n.6 (quoting Clerk’s Papers at 7, *City of Olympia v. Drebeck*, 126 P.3d 802 (Wash. 2006) (No. 75270–2)).

96. *Id.* at 803. Drebeck initially submitted an alternative calculation seeking a fee adjustment, but the City rejected his alternative calculations because they did not meet the “requisite accuracy and reliability criteria” set forth in the City’s municipal code. *Id.* When the City rules one way or another, either party may seek redress in the courts. Here, the issue was ultimately brought before Supreme Court of Washington. *Id.*

accurately portray the developer's fair share of improvement costs.

The City took one additional step to improve the average trip method described above, which allowed fees to more accurately reflect a developer's proportionate share of transportation improvements. The state legislature, using language similar to that found in the *Nollan* and *Dolan* standards,<sup>97</sup> envisioned that, "[T]he local government's impact fee ordinance must 'allow the county, city, or town . . . to adjust the standard impact fee . . . to consider unusual circumstances in specific cases' and to consider 'studies and data submitted by the developer.'"<sup>98</sup> The state legislature felt that "[t]hese provisions, in conjunction with the requirements of the fee schedule, serve the legislature's aim of 'ensur[ing] that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees.'"<sup>99</sup> This method is a step in the right direction because it takes into account certain site-specific conditions, which provides a more accurate measure of each development's proportionate share cost than the average trip method.

Each method used to impose a transportation impact fee in this section has been proven a valid exercise of local authority. Although, each method may exhibit certain characteristics of fairness and equitability, most exhibit some deficiency in providing a sufficient nexus or establishing a developer's proportionate share cost of improvements. This Article sets out to find a method that most accurately conforms to the *Nollan* and *Dolan* standards. The next section includes an analysis of the different methods and provides a specific recommendation to guide the states when deciding which method they should adopt to answer the question of when local governments should assess a transportation impact fee.

#### IV. ANALYSIS AND RECOMMENDATIONS

Local governments' determination of when to assess a transportation impact fee is often the main source of legal problems. Generally, local governments have the option of choosing between two basic methods: trips generated or average trip. The average trip method may also include minor adjustments, including the rebuttal

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97. *Id.* at 808. This case was used to illustrate the average trips plus rebuttal method. Although the majority expressly denies that the legislature was trying to conform to the *Nollan* and *Dolan* standards and holds that both cases have no application to the fee scheme in question, this method is still a good example. *Id.* In fact, the dissent argues that *Nollan* and *Dolan* should apply and would be satisfied by the described method in the case. *Id.*

98. *Id.* at 807 (quoting WASH. REV. CODE. § 82.02.060(4)–(5) (2006)).

99. *Id.* (quoting WASH. REV. CODE. § 82.02.050(1)(c) (2006)).

option, which allow the fee to conform to the established guidelines. This section analyzes the general differences between the trips generated and average trip methods by discussing the advantages and disadvantages of each method. The recommendation included in this section is that a “hybrid method” that seeks to incorporate the favorable characteristics of each method will most accurately establish an essential nexus and ensure fair distribution of costs among developers.

#### *A. Essential Nexus*

The essential nexus standard requires that the transportation impact fee be related to the traffic growth attributable to new or proposed development. The system for imposing a transportation impact fee will likely be found invalid when the local governments imposing the fee fail to provide specific standards or establish a correlation between the fee and the transportation improvements. Most local governments may satisfy this burden by completing the preliminary steps discussed previously in this Article; however, even when the preliminary steps are performed, there are times when local governments may adopt a method that simply erases any correlation between the fee and the required improvements.

The use of a trust fund in any method seems to eliminate the correlation between the fee and the transportation improvements. Specifically, the average trip method appears to destroy this relationship since it establishes the use of a trust fund, which utilizes the funds to cover the costs of transportation improvements throughout a specified zone.<sup>100</sup> According to one of the ordinances, the developer’s contribution could be used to pay for other improvements needed in the zone within a six-year window that may not have been necessitated by the specific development.<sup>101</sup> In this manner, the addition of the trust fund resembles a tax because the developers paying the fees are potentially not receiving any benefit from them, leaving the state vulnerable to arguments by developers that the fee is not sufficiently tailored.<sup>102</sup> To retain a correlation between the fee and the transportation improvements and minimize the chance of future

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100. *Home Builders & Contractors Ass’n of Palm Beach County v. Bd. of County Comm’rs*, 446 So. 2d 140, 142 (Fla. Dist. Ct. App. 1983); *Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966, 970 (Or. Ct. App. 2002);

101. *Home Builders*, 446 So. 2d at 142.

102. *Id.* at 143–44 (noting that the plaintiffs argued that “the charge [is] in reality a tax” because there was “too great a disparity between those who pay and those who receive the benefit”).

litigation, the state should avoid adopting a system that incorporates the use of a trust fund.

Proponents of the average trip method could argue that the fee is not a tax since the benefit could be determined on a zonal or jurisdictional level;<sup>103</sup> however, the fact that the funds could be used to pay for other transportation related improvements within the zone potentially negates the correlation between the fee and the transportation improvements necessitated by each specific development. Conversely, the improvement costs calculated from the trips generated method clearly relate to the transportation improvements. As noted above, fees are calculated and assessed in connection with each development's specific impact on the surrounding roadway network. Thus, the trips generated method establishes an essential nexus between the fee and the necessary improvements. Consequently, it may appear that the trips generated method is better aligned with the requirements of *Nollan* and *Dolan*; however, the proportionate share argument brings to light other problems with this method.

### *B. Proportionate Share*

The decision of when to assess a transportation impact fee has an effect on the proportionate share that a development must contribute as part of their fee. When comparing the two approaches, each has distinct disadvantages. On the one hand, the trips generated method imposes a fee on developments when they push the roadway below the city standard; thus, the last developer ends up paying for the transportation impacts caused by all the others. On the other hand, the average trip method applies a uniform fee, failing to account for any site-specific conditions that may be factors in minimizing the overall impact on the transportation infrastructure.

The trips generated approach represents an opportunity cost for a majority of developers and does not accurately reflect each development's proportionate share of the transportation impacts. For example, only the developer that causes the LOS of the roadway or intersection to fall below the city standard will have to contribute to the cost of bringing the roadway or intersection back up to standard.<sup>104</sup> Contrast this with developers who construct their projects earlier, when the roadway has not reached its full capacity. Although each development increases the existing and future traffic demands on the

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103. *See id.*

104. SNYDER & STEGMAN, *supra* note 1, at 83.

existing roadway network, earlier developers will not have to provide their proportionate share for the improvements if their projects do not push any segment below the city standard.<sup>105</sup> To provide an analogy of the situation, developments are only assessed a transportation impact fee for their impact if they happen to be the “last” cup of water that caused the bucket to overflow, after many other cups have already contributed to the rising water level. Under the trips generated method, all the other cups that contributed to the “spill over” would bear no responsibility. It should be clear, however, that each cup contributed to the increasing water level in the bucket and ultimately caused the overflow. Similarly, each development contributes to the burden placed on the transportation system and therefore should bear a proportionate share of the improvement costs.

Thus, it may now appear that the average trips approach, where each development is held accountable for its transportation impact, is the best approach. By adopting the average trips approach, local governments would be able to avoid future litigation since each development would be held accountable for its individual impact on the transportation system. In line with the previous analogy, each developer would have to provide funding for their contribution to the spill over, and not just the last developer. The average trips method, however, is not without its own flaws.

The primary disadvantage of the average trip method is that it is too rigid in its application. In other words, “individualized determinations,” that would generally show that the fee is “related both in nature and extent to the impact of the proposed development” are absent in this method.<sup>106</sup> The average trip method includes a uniform fee for each land-use type and practically eliminates any discretion when calculating fees.<sup>107</sup> Often times, this can prove to be an insufficient method since many developments exhibit several location-specific conditions that can minimize the impact on the transportation infrastructure.<sup>108</sup> Some of these conditions may include daily variations among land-uses, the availability of transit, walk-in traffic, passer-by traffic, or mixed-use development.<sup>109</sup> Unfortunately,

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105. *Id.*

106. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

107. *Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966, 981 (Or. Ct. App. 2002).

108. *STOVER & KOEPKE*, *supra* note 2, at 29, 39–40.

109. *Id.* Many land-use types exhibit daily variations, for example, trips generated by banks, shopping centers, and restaurants should be calculated based upon the “highest weekday, rather than the average weekday, trip rate . . . since the higher rates and associated traffic problems will occur several times per year.” *Id.* at 29. The availability of transit and walk-in traffic can also decrease the impact on the transportation system, since more people will use the transit services rather than vehicles to get to the new or proposed development. *Id.* at 39. Passer-

the average trip method rejects the idea of using a discretionary analysis that would make use of these factors to determine each development's proportionate share cost for transportation improvements. Thus, local governments employing this method base their determinations of when to calculate fees on a "'mechanical method' rather than on the appropriateness of the analysis and the proper interpretation of the potential traffic impacts."<sup>110</sup>

The average trip plus rebuttal method seeks to remedy this rigidity by extending the average trip method to include an opportunity for developers to provide their own independent analysis.<sup>111</sup> The opportunity to submit an independent analysis when there is a disagreement with the local government's assessment allows developers to offer mitigating information so that the fee better reflects their proportionate share. Similar to the trips generated method, the average trips method would now take into consideration certain location-specific factors that could decrease the overall effect a development has on the existing roadway system. With this addition, it may appear that the disadvantage of not allowing adjustments to the fee schedule is remedied. However, this remedy may not be as beneficial to the developers as one may think; the following analogy illustrates this principle.

At Hometown Buffet, an all-you-can-eat buffet, a person normally pays a flat rate to gorge himself with food, which ultimately benefits those with big appetites. Now suppose that in order to please those with smaller appetites, Hometown Buffet implements a system that charges people according to the amount of food they eat during their visit. If the amount of food consumed costs less than the flat rate, then customers could get a refund. Hometown Buffet then begins to lose money because some people are taking less food than the maximum, although the restaurant is still obligated to provide enough food for everyone to take up the maximum. In order to make up for losses, Hometown Buffet must increase the amount that they charge for food. In the end, no one benefits. Likewise, a government estimates the amount necessary to compensate for the net burden on the

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by traffic does not contribute to any roadway impact since it is traffic generated by certain land-uses, i.e. fast-food restaurants and gas stations, that are "already on the adjacent street and merely stops at the establishment passing by." *Id.* at 46. Mixed-use developments also lessen the impact on the roadway system since individuals are able to travel within the development to complete several errands. *Id.* at 47. Thus, all these different site-specific conditions could minimize the impacts on the roadways surrounding new or proposed developments.

110. *Id.* at 49.

111. *City of Olympia v. Drebeck*, 126 P.3d 802,803 (Wash. 2006). According to the state legislature, they allowed a developer's rebuttal of a fee in order to "protect 'specific developments' from impact fees that were 'arbitrary' . . . ." *Id.* at 807. (quoting WASH. REV. CODE. § 82.02.050(1)(a)-(c) (2006)).

transportation system imposed by all developments of the same land-use type, which is a cost the developers must pay to derive the benefit of developing, and which is accordingly spread over all participants. However, as some individual developers successfully lower their fees, the net amount the government receives will not sufficiently cover the cost of the net burdens. To compensate for losses occasioned by each rebuttal, local governments would likely feel the need to increase their initial fees, so that the net intake would be sufficient. Thus, developers end up paying more per average trip.

While each of the three methods clearly has some distinct disadvantages, the trips generated and average trip plus rebuttal methods share an advantageous characteristic—they both allow the performance of a TIS. The trips generated method performs a TIS up front to determine fees, while the average trips plus rebuttal allows a TIS on the back end as evidence that the local governments' fee determination may be excessive. The TIS includes specific impact of each development on the surrounding roadway network and thus may more accurately determine each development's proportionate share. As part of the TIS, one of the most common methods utilized to determine the impact on the surrounding transportation infrastructure is the number of trips or traffic generated by the new or proposed development.<sup>112</sup> Many different considerations must be taken into account by transportation professionals in order to make educated professional estimates to determine which trips are related to the development.<sup>113</sup> Although the TIS involves the discretionary judgment of transportation professionals that is often subject to human error, it provides a substantial basis for not only establishing a correlation between the fee and the improvements, but also the development's proportionate share cost of those improvements.

When faced with the choice of adopting one method or another, both tend to have their distinct advantages and disadvantages. As can be seen from the arguments, it would be difficult for state governments to decide on a specific method to implement at local levels when adopting an optimal transportation impact fee system. If a state were able to dissect each potential method and only take the advantageous characteristics, then establishing a standard method better than the others would appear to be more plausible. The following subsection includes a recommendation for states to consider that involves adopting a "hybrid method" that better answers when to

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112. *STOVER & KOEPKE*, *supra* note 2, at 28–29, 39–40; *see also* *F & W Assocs. v. County of Somerset*, 648 A.2d 482, 485 (N.J. Super. Ct. App. Div. 1994).

113. *See generally* *STOVER & KOEPKE*, *supra* note 2, at 28–79 (Chapter 3 explains the intricate and extensive procedures used in each TIS).

assess transportation impact fees.

*C. The Recommendation: The Hybrid Method*

The hybrid method is a fusion of all the different methods. In fashioning this method, it is important to consider the advantages and disadvantages of the other methods. The hybrid method ultimately seeks to apply the beneficial aspects of the other methods, while eliminating those that are detrimental. The method can be summarized in three advantageous parts: (1) calculating the transportation impact fee based on the actual number of trips generated; (2) charging every development that impacts the roadway or intersection with a fee; and (3) allowing the developer to rebut the local governments' impact fee assessment. In harmony with *Nollan* and *Dolan*, the hybrid method would hold each development responsible for their specific impact on the transportation system, while also providing an opportunity to rebut a fee if they felt it did not reflect their proportionate share.

The hybrid method exploits an advantage of the trips generated method while offering a remedy to a deficiency created by the average trip method. One of the primary disadvantages of the average trip method is that it is too rigid in its application because it fails to take into account certain location-specific conditions. The hybrid method seeks to eliminate this disadvantage by calculating an impact fee based on the number of trips actually generated by the new or proposed development, and not a predetermined fee schedule. The actual trips generated by each development are determined by following a process similar to the one used in the trips generated method, which includes performing a TIS.<sup>114</sup> The use of a TIS allows the impact of each development to be analyzed separately and on an individual level. Unlike the average trip method, the hybrid method takes into account special circumstances, which may often have an effect on each development's actual impact on the surrounding transportation system. Basing the calculation of a transportation impact fee on the actual trips generated by each specific development provides flexibility and allows the fee to more accurately reflect their fair share of the roadway improvements.

Conversely, the hybrid method also exploits an advantage of the average trip method while seeking to resolve a disadvantage that results from applying the trips generated method. The primary disadvantage of the trips generated method was that it only assessed a fee when the LOS deteriorated below a predetermined local standard,

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114. See *supra* Part III.B.1.



which created an opportunity cost to a majority of developments. One development was held accountable for the brunt of the improvement costs and had to pay for the impact of all the others. Unlike the trips generated method, the hybrid method holds all developers accountable for their share of the transportation impacts. This method remedies the cost inequality disadvantage by issuing a fee to every development that impacts the transportation system, whether or not they were the specific development that eventually caused the roadway LOS to deteriorate below the local standard. By holding each development responsible for its impact, the fees assessed under the hybrid method provide a more precise representation of each development's proportionate share of transportation improvements.

Finally, allowing an independent analysis was how local governments sought to remedy the rigidity of the average trips method. Following this example, the hybrid method allows developers to rebut the local governments' determination of the transportation impact fee by submitting their own independent analysis. Although allowing a rebuttal may potentially cause an increase in complaints and the initial rates local governments would have to charge, the benefits appear to outweigh the weaknesses. The opportunity to rebut an impact fee through an independent analysis would provide the means to correct any errors of the transportation professional. Additionally, it is likely that only an egregious error of judgment would motivate developers to perform their own analysis, due to the extensive time and cost involved with a TIS. Thus, permitting an independent analysis would further support the underlying policy that a fee must resemble the proportionate share of each development's impact.

Both the developer and the local governments would benefit from the implementation of this method because it exploits the advantages and eliminates the disadvantages of the other methods. Each development would be held responsible for their specific impact on the roadway network, but would also have the opportunity to rebut the local governments' fee assessment if it did not reflect their proportionate share. Accordingly, the hybrid method clearly answers the questions of when local governments should assess a transportation impact fee.

#### IV. CONCLUSION

The main questions that have surfaced regarding transportation impact fees are simply *how* and *when* to assess such fees on new or proposed developments. This Article has attempted to answer those simple questions with reference to *Nollan* and *Dolan* and has

recommended a specific solution for each that satisfies the requirements set forth by the Court in those cases. Completing preliminary measures appears to answer how to justify transportation impact fees. Local governments could establish a correlation between the fee and the necessary improvements and each development's proportionate share given they create a transportation master plan, set standards for roadway and intersection serviceability, and require a TIS to analyze each development's impact on the transportation system. The answer for when to assess a transportation impact fee was a bit more complex. Each method had its distinct advantages and disadvantages and therefore it was difficult to choose one method over another. The introduction of a hybrid method solved this problem because it included the beneficial aspects of each method, while removing the inadequacies. Thus, implementing a uniform system that requires preliminary measures and the use of the hybrid method would most accurately answer *how* to justify transportation impact fees and the *when* to assess them. Such a uniform system would help reduce litigation that generally results from local governments exercising discretion in the absence of a sound uniform system, while simultaneously complying with the requirements for government exactions set forth in *Nollan* and *Dolan*.

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